

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No.: 3:23-cv-00547-ART-CSD

DAVID AGUILAR,

Plaintiff

v.

TAFELMEYER, et al.,

Defendants

Order

Re: ECF No. 47

Before the court is Plaintiff's second motion for leave to amend his complaint and proposed first amended complaint (FAC). (ECF Nos. 47, 47-1) Defendants filed a response. (ECF Nos. 54, 54-1.) Plaintiff filed a reply. (ECF No. 55.)

For the reasons set forth below, the motion is granted.

I. BACKGROUND

Plaintiff is an inmate in custody of the Nevada Department of Corrections (NDOC). When he filed this action, he was proceeding pro se, but he was subsequently appointed pro bono counsel.

The court screened Plaintiff's original complaint and allowed him to proceed with an Eighth Amendment excessive force claim against defendants Johnson, Tafelmeyer, Mahon, and Sheeks, and an Eighth Amendment deliberate indifference to serious medical needs claim against Tafelmeyer.

Plaintiff, through his counsel, then filed a motion for leave to amend and proposed amended complaint to add a claim for relief under the Americans with Disabilities Act (ADA) against NDOC. (ECF Nos. 38, 38-1.)

1 The undersigned issued a report and recommendation that the motion to be denied
2 because Plaintiff did not state a plausible claim for relief under the ADA, and the Eighth
3 Amendment deliberate indifference to serious medical needs claim was asserted against all four
4 individual defendants, but there were only allegations regarding a denial of medical care as to
5 Tafelmeyer. (ECF No. 45.)

6 Plaintiff then withdrew the motion for leave to amend (ECF No. 46), rendering the report
7 and recommendation moot. Plaintiff has filed a new motion for leave to amend and proposed
8 FAC. (ECF Nos. 47, 47-1.) The proposed FAC once again seeks to include an ADA claim
9 against NDOC, as well as an Eighth Amendment deliberate indifference to serious medical needs
10 claim against only Tafelmeyer, and an Eighth Amendment excessive force claim against
11 Johnson, Tafelmeyer, Mahon, and Sheeks.

12 II. LEGAL STANDARD

13 “A party may amend its pleading once as a matter of course within: (A) 21 days after
14 serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after
15 service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f),
16 whichever is earlier.” Fed. R. Civ. P. 15(a)(1)(A), (B). Otherwise, a party must seek the opposing
17 party’s written consent or leave of court to amend a pleading. Fed. R. Civ. P. 15(a)(2). Here,
18 Plaintiff was required to seek leave to amend.

19 “The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2).
20 Leave to amend need not be given where amendment: “(1) prejudices the opposing party; (2) is
21 sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile.” *Amerisource*
22 *Bergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (citation omitted).

1 In addition, under 28 U.S.C. § 1915A, “[t]he court shall review, before docketing, if
2 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
3 which a prisoner seeks redress from a governmental entity or officer or employee of a
4 governmental entity.” 28 U.S.C. § 1915A(a). In conducting this review, the court “shall identify
5 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
6 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
7 monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

8 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
9 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915A(b)(1) tracks
10 that language. As such, when reviewing the adequacy of a complaint under these statutes, the
11 court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668
12 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule 12(b)(6) is essentially a ruling on a question
13 of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation
14 omitted).

15 The court must accept as true the allegations, construe the pleadings in the light most
16 favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,
17 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less
18 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
19 (1980) (internal quotation marks and citation omitted).

20 A complaint must contain more than a “formulaic recitation of the elements of a cause of
21 action,” it must contain factual allegations sufficient to “raise a right to relief above the
22 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
23 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]

1 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
 2 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
 3 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

4 **III. DISCUSSION**

5 Defendants argue that amendment would be futile because Plaintiff failed to exhaust
 6 administrative remedies; however, the court must take Plaintiff’s allegations as true for pleading
 7 purposes, and exhaustion is an affirmative defense that must be raised in a motion for summary
 8 judgment unless the failure to exhaust is clear from the face of the complaint. *Albino v. Baca*,
 9 747 F.3d 1162, 1166 (9th Cir. 2014). Here, exhaustion is not clear from the face of the
 10 complaint, and is not properly raised in response to Plaintiff’s motion for leave to amend.
 11 Therefore, this is not a basis to deny the motion for leave to amend.

12 Defendants also argue that amendment is futile because Plaintiff fails to articulate an
 13 ADA claim.

14 The court finds that, unlike the previous proposed amended complaint, Plaintiff states a
 15 colorable claim for relief under the ADA against NDOC.

16 Title II of the ADA, which prohibits discrimination on the basis of disability, applies in
 17 the prison context. *See United States v. Georgia*, 546 U.S. 151, 154 (2006); *O’Guinn v. Lovelock*
 18 *Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007); *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th
 19 Cir. 2002). “[N]o qualified individual with a disability shall, by reason of such disability, be
 20 excluded from participation in or denied the benefits of the services, programs, or activities of a
 21 public entity, or be subject to discrimination by any such entity.” 42 U.S.C. § 12132.

22 A plaintiff must allege:

- 23 (1) He is an individual with a disability; (2) he is otherwise
 qualified to participate in or receive the benefit of some public

1 entity's services, programs, or activities; (3) he was either
2 excluded from participation in or denied the benefits of the public
3 entities' services, programs, or activities, or was otherwise
4 discriminated against by the public entity; and (4) such exclusion,
5 denial of benefits, or discrimination was by reason of [his]
6 disability.

7 *O'Guinn*, 502 F.3d at 1060 (quotation marks and citation omitted).

8 An inmate may state a Title II discrimination claim based on the "alleged deliberate
9 refusal to accommodate [his] disability-related needs in such fundamentals as mobility, hygiene,
10 medical care, and virtually all other prison programs[.]" *Georgia*, 546 U.S. at 157.

11 Plaintiff alleges that he is a qualified individual with a disability and that NDOC failed to
12 provide him with a requested red or yellow vest for vision-impaired inmates; failed to properly
13 train its officers on how to interact with and accommodate visually impaired inmates, which led
14 to Johnson harassing him for issues directly related to his vision impairment, and ultimately, the
15 excessive force incident that is the subject of this litigation. In addition, he alleges that NDOC
16 failed to adjust mealtime allowances and other daily routines to accommodate Plaintiff's slower
17 pace due to his visual impairment, failed to maintain Plaintiff's living space in a manner to
18 accommodate his visual impairment, and failed to appropriately classify and house him to ensure
19 his safety and access to necessary accommodations for a visually impaired inmate. Plaintiff
20 alleges the failure to provide accommodations included Johnson's initial use of force by striking
21 Plaintiff with his headphones without ensuring Plaintiff could hear and understand his
22 commands, and then beating and tasing Plaintiff while restrained, despite his obvious
23 vulnerability due to his visual impairment. He further alleges that the refusal to allow him
24 medical care after the incident disregarded the heightened risk of injury due to his pre-existing
25 eye conditions.

1 Taking the allegations as true, Plaintiff sufficiently alleges a violation of Title II of the
2 ADA by NDOC.

3 Defendants also assert that Nevada has refused to waive its immunity under the Eleventh
4 Amendment, and that section 1983 does not abrogate Eleventh Amendment immunity; however,
5 this claim is brought under Title II of the ADA, and not section 1983. “[T]he Supreme Court’s
6 decision in *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 163 L.ed. 650 (2006), ...
7 requires courts to analyze on a claim-by-claim basis whether Title II validly abrogates state
8 sovereign immunity as to the specific class of conduct at issue.” *Kohn v. State Bar of Cal.*, 119
9 F.4th 693, 696 (9th Cir. 2024). Defendants have not asserted an argument based on *Georgia*, and
10 the court will not address it *sua sponte* here. At this juncture, the court will allow Plaintiff to
11 proceed with the Title II ADA claim against NDOC.

12 Finally, Defendants make an argument under Federal Rule of Civil Procedure 15(d),
13 which governs supplemental pleadings, and is not at issue here.

14 In sum, for pleading purposes, Plaintiff has adequately alleged a claim under Title II of
15 the ADA against NDOC. Plaintiff also states colorable claims under the Eighth Amendment for
16 deliberate indifference to his serious medical needs against Tafelmeyer and for excessive force
17 against Tafelmeyer, Johnson, Mahon and Sheeks, for the reasons stated in the original screening
18 order.

19 IV. CONCLUSION

20 Plaintiff’s motion for leave to amend (ECF No. 47) is **GRANTED**.

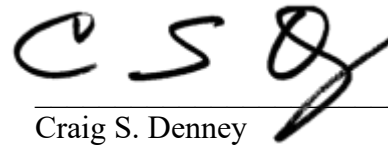
21 The Clerk shall **FILE** the FAC (ECF No. 47-1).

22 Within **14 days** of the date of this Order, the Attorney General’s Office shall file a notice
23 indicating whether it will accept service of the FAC on behalf of NDOC.

1 Within **21 days** of the date of this Order, Defendants shall file an answer or otherwise
2 respond to the FAC.

3 **IT IS SO ORDERED.**

4 Dated: December 12, 2024

A handwritten signature in black ink, appearing to read 'CS Denney', is written over a horizontal line.

Craig S. Denney
United States Magistrate Judge